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July 10, 2000

Via Electronic and U.S. Mail
Ms. Sherry Green
Office of Site Remediation Enforcement
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20004

Re: Potential EPA Guidance Regarding The Superfund Recycling Equity Act

Dear Ms. Green:

The Copper & Brass Fabricators Council ("CBFC") submits the following comments in response to the U.S. Environmental Protection Agency's ("EPA's") announcement that it is considering issuing guidance dealing with prospective recycling transactions under the Superfund Recycling Equity Act of 1999 ("SREA" or "the Act"). See 65 Fed. Reg. 37,370 (June 14, 2000).

I. COPPER & BRASS FABRICATORS COUNCIL

CBFC is an association of domestic fabricators of copper and brass products. As major producers of copper, brass and other copper-based alloys, CBFC members consume large quantities of copper-based scrap metal that is purchased from scrap brokers and dealers, i.e. the persons arranging for recycling. Accordingly, under the SREA, CBFC members are considered "consuming facilities." Also, several CBFC members have facilities that generate scrap for their own consumption and/or to sell to others, and are therefore considered both consuming facilities and persons arranging for recycling. As such, CBFC members have an interest in promoting the recycling of scrap metal, and support the Congressional intent behind the SREA to promote recycling.

II. COMMENTS

1. Whether EPA Should Issue Guidance

EPA requested comments on whether it should issue guidance on what constitutes "reasonable care" as contemplated by CERCLA Section 127(c)(5) & (6). CBFC supports the issuance of guidance, in principle, and is willing to work closely with EPA to ensure that any guidance provides the flexibility envisioned by the SREA to meet the "reasonable care" standard.

However, that guidance should not place undue burdens on CBFC members, most of whom are not obtaining any direct benefit from the SREA's provisions. Additionally, any guidance issued must be consistent with EPA's Congressional mandates under the SREA and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Such guidance would not be helpful to industry, if it is vulnerable to a legal challenge, either in a direct judicial proceeding against the guidance, or in a private contribution action in which a potentially responsible party relies on the guidance. Further, guidance must not undermine CBFC members' rights under CERCLA to seek contribution from scrap suppliers who cause contamination at their facilities and who have not met the conditions in SREA for obtaining relief from liability. SREA clarifies the liability provisions in CERCLA by defining recycling and distinguishing it from disposal or treatment. It does not indemnify scrap sellers and therefore any guidance that could be interpreted to do so would be exceeding EPA's mandate.

B. Recommendations

1. Flexibility

CBFC recommends that EPA provide guidance, if at all, on a limited basis that offers flexibility to scrap consumers and their scrap suppliers, to respond to different situations. There are significant variations among scrap producers, including CBFC members, arising out of geographic location, access to scrap markets, and the character of the relationships between the consumers and their scrap brokers. Scrap prices can vary widely from one region of the country to another and from one quarter to the next. They are often influenced by availability of the supply and transportation options.

Ownership and location of scrap processing facilities in relation to their customers are also factors. Some scrap consumers own scrap processing operations on site and occasionally purchase scrap from other dealers, junkyards, or from small family owned and operated scrap businesses. Other companies have exclusive agreements with major scrap dealers that work closely with their customers as part of a team. In other cases, scrap is obtained on the open market from several scrap processors. Additionally, some scrap consumers purchase scrap from metal fabricators and stamping plants, either directly or through brokers. Finally, CBFC members often recycle substantial quantities of scrap generated at their own facility, typically

trim scrap, also referred to as 'turn-around scrap.' Accordingly, guidance that is rigid or imposes one-size-fits all requirements on all scrap consumers would be unworkable.

2. "Substantive" Requirements

To take advantage of the relief from liability provided under SREA, scrap sellers have to exercise reasonable care to determine that the facility where the recyclable material is handled, processed, reclaimed, or otherwise managed by the scrap consumer is in compliance with substantive (not procedural or administrative) provisions of any Federal, State or local environmental law applicable to the handling, processing, reclamation, or other management activities associated with recyclable material. CERCLA § 127(c)(5). EPA guidance should clarify what is meant by "substantive" and "procedural or administrative." Scrap sellers must know exactly which requirements should be the subject of inquiry and which should not. It would be helpful to provide several examples that enable scrap sellers to distinguish substantive from procedural or administrative elements of the major environmental statutes.

In passing SREA, Congress intentionally excluded "procedural or administrative" requirements to protect persons arranging for recycling from losing protection afforded by the Act simply because of "a recordkeeping error, missed deadline, or similar infraction by the consuming facility which is out of control of the person arranging for recycling." 145 Cong. Rec. S15049 (daily ed. Oct. 25, 1999) (statement of Sen. Lott). Accordingly, requirements that deal with monitoring or recordkeeping should not be included in scrap sellers' inquiries to their customers.

Substantive requirements should be limited to those which regulate the discharge or release of pollutants into one or more types of media, either through the establishment of ambient standards, technological standards, or both.

3. Limited Scope of Inquiry

Significantly, any EPA guidance that is issued must recognize that the Act narrows the scope of the required inquiry to those regulations that pertain to the recycling of recyclable materials such as scrap metal. The Act limits the scope of the inquiry to laws and regulations that are "applicable to the handling, processing, reclamation, storage, or other management activities associated with recyclable material." CERCLA § 127(c)(5). Specifically with respect to scrap metal, the inquiry is similarly limited to "applicable regulations or standards regarding the storage, transport, management, or other activities associated with the recycling of scrap metal that the Administrator promulgates under the Solid Waste Disposal Act. . . ." CERCLA § 127(d)(1)(B). Hence, EPA's guidance must make clear that the required inquiry should focus only on those "substantive" requirements that are directly related to scrap handling and management at the consuming facility, and not on other regulatory requirements to which a facility may be subject. Facility activities beyond the scrap management stage of the production process should be excluded.

4. Publicly Available Databases

Scrap sellers should be encouraged to start the process of determining whether scrap consumers are in compliance with applicable substantive laws and regulations by looking at publicly available information. Possible compliance issues, if any, flagged in publicly available databases should then serve as the basis for further inquiries made directly with the scrap consumer regarding its operations. These databases can serve as a screening tool, placing scrap sellers on notice of the possibility of a compliance issue about which they should make further inquiries, when an incident of non-compliance is listed. This approach would streamline the inquiry and avoid burdening federal, state, and local environmental agencies with repeated compliance status inquiries.

C. Additional EPA Questions

In the Federal Register announcement, EPA posed several questions that are relevant to CBFC members, which are addressed as follows:

(1) How does a generator of scrap material currently exercise reasonable care in determining whether a consuming facility has been in compliance with substantive provisions of federal, state or local environmental laws?

The Institute of Scrap Recycling Industries ("ISRI") developed and distributed to its members a model checklist that scrap sellers could use in making inquiries directly to their customers regarding compliance. CBFC has advised its members that the checklist is voluntary, but also that the checklist is a tool designed to ensure that implementation of the SREA does not place an untenable burden on scrap consumers. While perhaps a useful tool, EPA should not require use of such a checklist or impose on scrap consumers any certification requirement that would, in effect, compel scrap consuming facilities to guarantee that the conditions of the SREA have been satisfied.

(5) As part of the assessment of what constitutes sufficient information, how much weight should standard industrial practices or prior business relationships with a particular facility or company be given in determining an individual consuming facility's behavior and compliance status?

CBFC believes that EPA should give substantial weight to standard industrial practices and prior business relationships. Both are indicators of the ability of a scrap seller to detect the nature of the consuming facility's scrap handling, processing, reclamation, or other management activities associated with scrap metal, which is one of the factors used to determine whether the scrap seller exercised "reasonable care." CERCLA § 127(c)(5)(B).

(6) How do the criteria contained in Section 127(c)(6) regarding "reasonable care" shape or direct the type of inquiry that is necessary to determine that a consuming facility is in compliance with substantive provisions of federal, state or local environmental laws?

Section 127(c)(6) indicates that "reasonable care" shall be determined using three criteria that include, but are not limited to, the following:

Price paid in the transaction -- Presumably, the purpose of this provision was to exclude from the definition of recycling transactions those involving material that has no market value or negative market value. Therefore, for CBFC members and scrap metal transactions in general, this provision is unlikely to be significant as there is a well-established market for scrap metal.

The ability of the seller to detect the nature of the consuming facility's operations concerning handling, processing, reclamation, or other management activities associated with the scrap - This criteria injects an element of subjectivity into what should be an objective standard. The ability of the seller to detect the nature of the consuming facility's operations is not relevant to whether the seller exercised reasonable care. For example, we do not believe that a small scrap company should be held to a lower standard of reasonable care, simply because it does not have an environmental engineer on staff to assess the customer's operations for compliance.

The burden must be on the scrap seller to show an inability to obtain information about the scrap consuming facility. There should be a readily ascertainable standard for determining exactly what information scrap consumers should be expected to provide to a scrap seller who requests it.

An equitable solution is to make the reasonable care standard as objective as possible. Under CERCLA's strict liability scheme, owners and operators of facilities and the person who arranged for transport of hazardous waste to a property can be held liable for the cost of clean-up if there is contamination, regardless of the exercise of reasonable care. Persons arranging for recycling are already gaining a tremendous advantage under the SREA by obtaining exemption from CERCLA liability, provided they meet certain conditions. EPA should not lower the bar and make it easier for scrap sellers to take advantage of the exemption provision just because they did not make the effort to obtain minimal information about a customer's facilities. Accordingly, scrap sellers should be required to show that they made a set of minimal inquiries about the nature of the consuming facility's operations, and only if the inability to obtain the information resulted from the consuming facility, should this be considered one of the criteria.

The results of inquiries made to appropriate federal, state or local environmental agencies - Consulting with publicly available databases provided by federal, state, and local agencies should be considered sufficient to satisfy this condition. Requiring more formal and direct inquiries with such agencies would only serve to burden these agencies unnecessarily, given the large number of scrap consumers for which such inquiries will be necessary. Accordingly,

EPA's guidance should encourage scrap sellers first to consult publicly available databases for compliance information and then follow-up with their customers as appropriate.

(7) Under what circumstances should site visits be required?

We do not believe that site visits should be required. Any such requirement would impair the flexibility in guidance that is supposed to assist scrap sellers and their customers and to make the process more efficient. Scrap sellers can always ask to visit a scrap consumer's operations, but we do not believe that site visits are necessary for obtaining a reasonable assurance of compliance with applicable laws and regulations.

(9) How often/frequently should generators be required to re-check the compliance status of consuming facilities?

EPA should suggest that scrap sellers make an inquiry yearly, and more frequently if the scrap dealer becomes aware of a condition or potential violation that raises concern about scrap management activities.

(10) Under what circumstances is it appropriate/sufficient to rely on a consuming facility's checklist or self-certification to satisfy the "reasonable care" standard?

CBFC believes that reliance on a consuming facility's checklist or self-certification should be considered sufficient to satisfy the requirements of the Act where a scrap supplier has consulted publicly available databases regarding a facility's compliance status. If the public database inquiry reveals no evidence of non-compliance, then the scrap supplier should be able to rely on the consuming facilities assertions of compliance, or self-certification, to satisfy the reasonable care standard.

III. CONCLUSION

CBFC supports EPA's efforts to provide a workable guidance document for scrap sellers and consumers to assist in compliance with the SREA. We look forward to working with EPA to develop a guidance document that reflects the comments made above.

If you have any questions, please do not hesitate to contact us.

Very truly yours,

John E. Arnett
Government Affairs Counsel
Copper & Brass Fabricators Council

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